United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7318

United States Court of Appeals

FOR THE SECOND CIRCUIT

DOMINICK PAMPILLONIA,

Plaintiff,

—against—

CONCORD LINE, A/S,

Defendant and Third-Party Plaintiff-Appellee,

—against—

COURT CARPENTRY AND MARINE CONTRACTING CO.,

Third Party Defendant-Appellant,

—and—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third Party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLEE

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TABLE OF CONTENTS

PAGE

Statement 1

The Facts 3

POINT I

The District Court's findings of fact upon which it based its conclusion that C. C. Lumber Co., Inc. breached its warranty of workmanlike performance were not clearly erroneous 7

POINT II

The uncontradicted testimony of Captain Wheeler as to custom and practice was properly considered by the District Court as proof that C. C. Lumber in fact used lubricants on April 3, 1969 13

POINT III

The District Court's conclusion that appellant must indemnify the shipowner was supported by proof at the trial that C. C. Lumber created the slippery condition on the deck of the S.S. Jill Cord and/or that it knew or should have known of such condition 19

CONCLUSION 27

Table of Authorities

PAGE

Cases:

Albanese v. N.V. Nederl. Amerik. Stoomv. Maats., 346 F.2d 481 (2nd Cir. 1965), rev'd on other grounds, 382 U.S. 283 (1966) 24

Bernardini v. Rederi A/B Saturnus, decided March 11, 1975, [No. 74-1404] (2nd Cir. 1975) 24

Calderola v. Cunard Steamship Co., 279 F.2d 475 (2nd Cir.), cert. den. 364 U.S. 884 (1960) 22
Caputo v. U.S. Lines Co., 211 F.2d 413 (2nd Cir.), cert. den. 374 U.S. 833 (1963) 23
Cereste v. New York, New Haven & Hartford R. Co., 231 F.2d 50 (2nd Cir.), cert. den. 351 U.S. 951 (1956) 10, 11

De Gioia v. U.S. Lines, 304 F.2d 421 (2nd Cir. 1962) .. 23
Dirring v. United States, 328 F.2d 512 (1st Cir.), cert. den. 377 U.S. 1003 (1964) 9
Dowding v. Compagnie Fabre Societe Generale, 1971 A.M.C. 1498 (N.D. Ill. 1971) 26
Drago v. A/S Inger, 305 F.2d 139 (2nd Cir.), cert. den. 371 U.S. 925 (1962) 22
D/S Ove Skou v. Hebert, 365 F.2d 341 (5th Cir. 1966), cert. den. 400 U.S. 902 (1970) 21

E. K. Wood Lumber Co. v. Andersen, 81 F.2d 161 (9th Cir.), cert. den. 297 U.S. 723 (1936) 9

F.A.R. Liquidating Corp. v. Brownell, 140 F. Supp. 535 (D. Del 1956) 9, 10

PAGE

Federal Reserve Bank v. Molloy, 264 U.S. 160 (1924) 17
Fegles Const. Co. v. McLaughlin Const. Co., 205 F.2d 637 (9th Cir. 1953) 9

Gallick v. Baltimore & Ohio R.R. Co., 372 U.S. 108 (1963) 10-11

Howard v. Capital Transit Co., 97 F. Supp. 573 (D.D.C. 1951), aff'd 196 F.2d 593 (D.C. Cir. 1952) 15
Hurdich v. East Coast Shipping Corp., 503 F.2d 397 (2nd Cir. 1974) 23

Ignatyuk v. Tramp Chartering Corp., 250 F.2d 198 (2nd Cir. 1957) 20
Italia Societa Per Azioni di Navigazione v. Oregon Stevedoring Co., Inc., 376 U.S. 315 (1964) 19, 23

Joel v. Research Products, 94 F.2d 588 (2nd Cir. 1938) 24
Joseph v. Krull Wholesale Drug Co., 147 F. Supp. 250 (E.D. Pa. 1956), aff'd 245 F.2d 231 (3rd Cir. 1957) 15

Lunsford v. Bethlehem Steel Corp., 269 F. Supp. 570 (D. Md. 1967) 23

Mamiye Bros. v. Barber S.S. Lines, Inc., 360 F.2d 774 (2nd Cir.), cert. den. 385 U.S. 835 (1966) 7
McAllister v United States, 348 U.S. 19 (1954) 7
McClellan v. Pennsylvania R. Co., 62 F.2d 61 (2nd Cir. 1932) 16
Musgrave v. Union Carbide Corp., 493 F.2d 224 (7th Cir. 1974) 10

PAGE

Santomarco v. United States, 277 F.2d 255 (2nd Cir.), cert. den. 364 U.S. 823 (1960) 22
Serra, Inc. v. S.S. Francesco C., 379 F.2d 540 (2nd Cir. 1967) 7
Smith v. General Motors Corp., 227 F.2d 210 (5th Cir. 1955) 9

Tropea v. Shell Oil Co., 307 F.2d 757 (2nd Cir. 1962) 16

United States v. Oddo, 314 F.2d 115 (2nd Cir.), cert. den. 375 U.S. 833 (1963) 15
United States v. Spaulding, 293 U.S. 498 (1935) 12
United States Shipping Board E.F. Corp. v. Levensaler, 290 F. 297 (D.C. Cir. 1923), cert. den. 266 U.S. 630 (1924) 16

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Federal Rules of Civil Procedure, Rule 52(a) 7
Jones on Evidence §364 (2nd Ed. 1972) 9
United States Department of Labor, Safety and Health Regulations for Longshoring (March 21, 1960):
29 C.F.R. §1504.2 (a)-(b) 24-25
29 C.F.R. §1504.3 (a) 25
29 C.F.R. §1504.3 (c) 25
29 C.F.R. §1504.91 (c) 25

United States Court of Appeals

FOR THE SECOND CIRCUIT

DOMINICK PAMPILLONIA,

Plaintiff,

—against—

CONCORD LINE, A/S,

Defendant and Third-Party Plaintiff-Appellee,

—against—

COURT CARPENTRY AND MARINE CONTRACTING CO.,

Third Party Defendant-Appellant,

—and—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third Party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLEE

Statement

Dominick Pampillonia sustained personal injuries on board the S.S. Jill Cord while working as a marine carpenter in the employ of C. C. Lumber Co., Inc. on April 3, 1969. Plaintiff claimed that he fell on the weather deck

of the vessel at hatch No. 5 having stepped in some grease or other slippery substance. The vessel was owned and operated by Concord Line, A/S, which had contracted with plaintiff's employer for the securing of certain cargo on board the vessel, including the chocking, boxing and lashing of that cargo.

Plaintiff alleged that the shipowner was negligent and that the vessel was unseaworthy due to the presence of grease or other slippery substance on the deck. Concord Line, A/S impleaded both C. C. Lumber Co., Inc., and International Terminal Operating Co., Inc., the loading stevedore. The shipowner alleged that either or both of the third party defendants had breached their respective warranties of workmanlike performance, in causing the slippery substance to encumber the deck of the vessel and/or failing to eliminate such substance. Therefore, it was claimed, they were liable to indemnify the shipowner for any and all sums recovered by the plaintiff. The third party action against International was discontinued during trial.

At the conclusion of the plaintiff's case, Judge Mishler granted shipowner's motion to dismiss the negligence claim against it, so that only the action for unseaworthiness was ultimately submitted to the jury. Judgment for $80,000 was entered upon the jury's verdict in favor of plaintiff and against Concord Line, A/S. Upon the stipulation of counsel the indemnity claim was tried by the Court. C. C. Lumber offered no testimony whatsoever on the third party claim, and, indeed, the only evidence produced on the indemnity claim was that of Captain William Wheeler who testified on behalf of the shipowner as an expert in mari-

time customs and practices in the Port of New York on the basis of his extensive experience as a ship's officer as well as a stevedore superintendent.

In a memorandum decision dated December 21, 1973, Judge Mishler found that the shipowner had established by a fair preponderance of the credible evidence that C. C. Lumber Co., Inc., had breached its warranty of workmanlike performance by:

> (1) Placing or dropping grease in an area normally used for passage by longshoremen;
>
> (2) Allowing the grease or other slippery substance to remain in an area used as a passageway by plaintiff and others thereby creating a dangerous condition and an unsafe place to work; and
>
> (3) Failing to eliminate a "slippery condition" as required by Sec. 1504.91(C) of the Safety and Health Regulations for Longshoring promulgated by the U. S. Department of Labor.

The judgment in favor of plaintiff has been satisfied. The only appeal here is by C. C. Lumber Co., Inc. from the judgment in favor of Concord Line, A/S for indemnity.

The Facts

On April 3, 1969, the S.S. JILL CORD was moored at Pier 2, Brooklyn, New York (8).* Plaintiff and his co-employee-witness Joseph Rina, marine carpenters, boarded the vessel at approximately 9 a.m. (21). They began to shore cargo in #2 or #3 hatch (19, 62), and did so

* Numbers in parentheses refer to pages in the Joint Appendix.

until approximately 11 a.m. (63). Upon completion of that job, they proceeded to the weather deck of the vessel on the offshore (starboard) side, at hatch #4 in order to box cylinders (19, 64), after which plaintiff and Rina went to lunch at 11:30 or 12, noon (65).

Upon their return from the meal break, plaintiff and Mr. Rina were instructed to chock cargo on the inshore side of the weather deck at hatch #5 (28, 65-66). Both Mr. Pampillonia and his witness observed at that time their co-employee who, using an electric saw, was cutting wood on the offshore side at No. 5 hatch (22, 24, 66-67) and passing the wood to plaintiff on the inshore side. After this cargo had been secured, plaintiff was directed by his foreman to No. 4 hatch in order to chock heavy lifts (9-10, 28, 67). Before actually going down into the hold, however, the foreman asked plaintiff to pick up the electric saw on the offshore side at No. 5 hatch (11). Mr. Pampillonia walked along the passageway between No. 4 and No. 5 from the inshore side where he had been working, and, having reached the end of that passageway, he made a right turn, aft, along the starboard hatch coaming. He took approximately one and one-half steps and then fell as a result of stepping in a slippery substance which encumbered the deck (12, 30-32). When Mr. Pampillonia got up, he noticed grease on his shoes and clothing and that there was grease on the deck (14, 34), which he described as "dark, oily" (36). In response to questions regarding his additional observations of the area in which his accident occurred, plaintiff stated that he noticed pieces of wood strewn in the vicinity and that "there must have been" sawdust there (23).

Mr. Pampillonia testified that only employees of C. C. Lumber were in the area prior to his accident (42). This was supported by Mr. Rina's testimony that hatch No. 5 was covered while he and plaintiff were working there (71). Moreover, Mr. Nielsen, Chief Officer on board the S.S. JILL CORD on April 3, referring to the log book of the vessel (257), testified later in the trial that all longshoremen had stopped loading No. 5 hatch at 11 a.m. on the day in question, and that the hatch was then closed (96-97).

In the course of his testimony, Chief Officer Nielsen identified a series of photographs depicting cylinders stowed on the weather deck of the vessel in the vicinity of the No. 5 hatch where plaintiff's accident occurred. He stated that the pictures which were taken shortly after plaintiff's accident, were a fair representation of that portion of the vessel at that time. From these exhibits, Chief Officer Nielsen testified that the cylinders had, in fact, been lashed on April 3, 1969 (112-113, 131-132).

On the trial of the third party claim for indemnity, the only testimony adduced was that of Captain William Wheeler who testified on behalf of the shipowner as an expert in maritime customs and practices in the Port of New York. He stated that it was the custom in New York, and indeed throughout the world, to use grease on the threaded elements of lashing components. More specifically, Captain Wheeler testified that the application of grease was "necessary" during the lashing process (222-223). He continued by relating that on more than one hundred occasions he had seen lashers who applied grease to deck lashings. Among his observations were instances when he saw employees of C. C. Lumber performing such

work (230-231). It should be noted that the testimony of Captain Wheeler regarding the custom and practice of using grease in the lashing process was uncontradicted.

Similarly uncontradicted was his testimony describing the operations of a saw such as the one which was used by plaintiff's co-employee on April 3, 1969. Captain Wheeler testified that the blade of the saw must be lubricated after every third piece of two by four is cut. Accordingly, the saw is equipped with a plunger which is depressed in order to squirt oil onto the blade. If this is not done the components of the saw will become overheated (226-227). He also stated that the dunnage which is used to chock cargo is green lumber which emits a sap when cut. The lubricating oil of the saw mixes with the sap as well as with sawdust from the lumber and periodically "a lump of this material; oil, sawdust and sap from the tree will be ejected from the saw" (227-228). This gives "a greasy appearance" with "solid matter" (226-227). This latter testimony was supported by that of Chief Officer Nielsen who stated that the substance that he observed on the deck after plaintiff's accident was brown with some solid matter in it (110).

POINT I

The District Court's findings of fact upon which it based its conclusion that C. C. Lumber Co., Inc. breached its warranty of workmanlike performance were not clearly erroneous.

The law is well settled in this Circuit that findings of fact, in this case made by the Court itself, will not be overturned unless clearly erroneous. F.R.C.P. 52(a); *McAllister* v. *United States*, 348 U.S. 19 (1954); *Serra, Inc.* v. *SS Francesco C.*, 379 F.2d 540 (2 Cir., 1967); *Mamiye Bros.* v. *Barber S.S. Lines, Inc.*, 360 F.2d 774 (2 Cir.), cert. den., 385 U.S. 835 (1966). To arrive at this appellate determination, a careful examination of the evidence adduced at the trial must be made.

The record in the instant case indicates that Mr. Nielsen, Chief Officer on board the S.S. Jill Cord on April 3, 1969, testified that at 11:00 a.m. on that date hatch No. 5 was closed (96-97), all stevedoring work having been completed. The Chief Officer, during his testimony, made use of the vessel's log book which was admitted into evidence (Exhibit "O"; 257-258). Thus, no longshore gangs were working in that area at the time of plaintiff's accident at 3:00 p.m. nor for four hours prior thereto. There is further testimony from Mr. Pampillonia that only the employees of C. C. Lumber were in that area prior to his accident (42). The plaintiff further testified that he noticed his co-employee, a sawman, on the offshore side at hatch No. 5 (22) who was cutting pieces of wood being used by Mr. Pampillonia and Mr. Rina in chocking cargo on the inshore side. The plaintiff also noticed pieces of wood in the area

where his accident occurred and stated that "there must have been" sawdust there (23).

With respect to whether or not lashing had been performed at hatch No. 5 prior to plaintiff's accident, Mr. Nielsen testified at p. 19 of the trial transcript that the cylinders which had been loaded at hatch No. 5 would have to be lashed. He further identified photographs of these cylinders so stowed, which photographs were taken a short time after plaintiff's accident (112-113, 131-132). He stated that the pictures were a clear representation of the portion of the vessel in question (112-113), and ultimately testified from these photos that the cylinders had in fact been lashed (132).

Captain Wheeler, the maritime expert who testified on behalf of the shipowner on the indemnity claim, stated not only that it was the custom in the Port of New York to use grease in lashing cargo but that grease was *necessary* to the lashing process (221-225). It was also his testimony that oil is used to lubricate a saw such as the one used by plaintiff's co-employee. Lubrication is effected by means of a plunger which must squirt oil onto the blade after every third piece of lumber is cut (226-227). That substance is emitted from the saw, and combines with sawdust and sap from the green lumber which was cut here for the chocking procedure (234-237). Captain Wheeler testified that this mixture of oil, sawdust and sap gives a "greasy appearance" (236).

The shipowner contends that from the direct evidence establishing the exclusive presence of C. C. Lumber employees in the area at hatch No. 5 prior to plaintiff's accident and that the cargo was in fact lashed, combined

with Captain Wheeler's testimony that the use of grease was necessary in the lashing process, the Court as the trier of fact on the indemnity claim could reasonably infer the following: that the third party defendant used grease in lashing cargo on board the S.S. Jill Cord on April 3, 1969 and, further, that some of that grease fell to and encumbered the deck of the vessel at hatch No. 5 thus proximately causing plaintiff's accident. A similar sequence of direct evidence, circumstantial evidence, and reasonable inferences flowing therefrom can be seen with respect to the oil used to continuously lubricate the saw and which became greasy when mixed with sawdust and sap. It was perfectly proper for the Court to make these inferences, whether they be based upon direct and/or circumstantial evidence. *Jones on Evidence* §364 (2nd Ed. 1972), cited approvingly in *Fegles Const. Co.* v. *McLaughlin Const. Co.*, 205 F.2d 637, 640 (9th Cir., 1953) and *E. K. Wood Lumber Co.* v. *Andersen*, 81 F.2d 161 (9th Cir.), cert. den., 297 U.S. 723 (1936). It is the shipowner's contention that these conclusions flow directly from the evidence adduced at trial. Should this Court, however, be of the view that in order to reach such conclusions with respect to *grease*, certain inferences based upon other inferences must be employed, there is ample authority for such use. *Fegles* and *E. K. Wood* cases, *supra; Smith* v. *General Motors Corp.*, 227 F.2d 210 (5th Cir., 1955); *F.A.R. Liquidating Corp.* v. *Brownell*, 140 F. Supp. 535 (D. Del., 1956).

As the Court stated in *Dirring* v. *United States*, 328 F.2d 512, 515 (1st Cir.), cert. den., 377 U.S. 1003 (1964):

> "The rule is not that an inference, no matter how reasonable, is to be rejected if it, in turn, depends

> upon another reasonable inference; rather the question is merely whether the total evidence, including reasonable inferences, when put together is sufficient . . . (cases omitted). If enough pieces of a jigsaw puzzle fit together the subject may be identified even though some pieces are lacking."

Appellant, citing *Cereste* v. *New York, New Haven and Hartford R. Co.*, 231 F.2d 50, 53-54 (2nd Cir.), cert. den., 351 U.S. 951 (1956), argues (at page 10 of the brief) that even if the lower court was correct in the instant case in concluding that C. C. Lumber Company used grease in the lashing process, the only permissible conclusion is that it used the substance prudently. The fact remains, however, that grease *was* found on deck and *did* cause plaintiff's accident. Therefore, it was permissible for the District Court to infer that the grease had been used in a manner which caused it to encumber the deck of the vessel. It is the shipowner's position that it is peculiarly within the function of the trier of the facts to select between conflicting inferences that which it considers most reasonable, and that having done so, "an Appellate Court will not reweigh the evidence or reject properly deducible inference." *Musgrave* v. *Union Carbide Corporation*, 493 F.2d 224, 229 (7th Cir., 1974). The only restriction on making an inference based upon a fact established by direct or circumstantial evidence is that such inference be probable. *F.A.R. Liquidating Corporation, supra* at p. 540.

The case of *Gallick* v. *Baltimore & Ohio R.R. Co.*, 372 U.S. 108 (1963), is illustrative of the extent to which inferences can reasonably be made based upon circumstantial

evidence adduced at trial. There, the Supreme Court of the United States upheld a verdict allowing plaintiff, a railroad crew foreman, to recover for injuries sustained from the bite of an insect which the jury could infer had come from or been attracted by a fetid pool which the jury could, in turn, infer the defendant railroad had been negligent in maintaining. The Supreme Court, in reversing the Ohio Court of Appeals, stated at page 114:

> "The Court of Appeals erred in demanding either 'direct evidence that the existence of the unidentified bug at the time and place had any connection with the stagnant and infested pool' or else more substantial circumstantial evidence than that adduced here 'that the pool created conditions and influences which helped to incubate or furnish an environment for the bug . . . or that the insect, having traveled from other areas, became contaminated or infected by the pool.'"

Further, the *Gallick* Court rejected the Ohio Court's determination that the evidence was "a series of guesses and speculations." 372 U.S. at 112.

The shipowner in the instant case submits that if the United States Supreme Court allowed the aforementioned inferences based upon the facts in *Gallick,* surely the conclusion reached by the District Court here, based upon reasonable inferences, cannot be viewed as a series of conjectures.

Appellee here, after a careful reading of the *Cereste* case *supra,* contends that the decision in that case is not supportive of the argument made by appellant at page 10 of the brief and discussed above. Moreover, appellant cites

United States v. *Spaulding*, 293 U.S. 498, 506 (1935), in support of the proposition that, even if the testimony of Captain Wheeler established C. C. Lumber's possession of grease, this testimony could not prevail over established facts and furnishes no basis for opposing inferences (page 11 of the brief). The shipowner urges that the *Spaulding* case is inapposite. There the plaintiff, a member of the United States Navy, claimed damages for a period during which he was allegedly suffering from a total and permanent physical disability. Opinion evidence was offered on behalf of plaintiff to establish the permanency of the disability. Testimony was taken at trial, however, to the effect that after the period of claimed disability, plaintiff had been found fit for service as an air pilot and had in fact worked and earned substantial compensation. The Supreme Court of the United States simply concluded that given this finding of fitness and the fact of employment, the disability, if any, was, by definition, temporary as opposed to permanent, and stated at page 506 that "as against the facts *directly* and *conclusively* established, this opinion evidence furnishes no basis for opposing inferences." (Emphasis supplied.) In the instant case, there is no conclusive proof that lashing did not take place prior to the plaintiff's accident nor that C. C. Lumber did not use grease in the process. Thus, from the photographs depicting lashed cargo and the uncontradicted testimony of Captain Wheeler, the District Court properly inferred that third party defendant was responsible for the slippery substance which caused plaintiff's fall. Moreover, assuming *arguendo* appellant's argument at page 10 of the brief that the legal presumption is that reasonable care was exercised by C. C. Lumber, the reasonable inferences made

from the evidence at trial are sufficient in this case to rebut any such presumption. Those inferences, made by the District Court in its findings on the indemnity claim, were not clearly erroneous, and, therefore, the lower court ruling should be allowed to stand.

POINT II

The uncontradicted testimony of Captain Wheeler as to custom and practice was properly considered by the District Court as proof that C. C. Lumber in fact used lubricants on April 3, 1969.

With respect to Captain Wheeler's testimony, appellant strenuously argues (at page 6 of the brief) that "at no time did he even say that the use of grease was a trade custom and practice." It is the shipowner's contention that appellant's reading of the pertinent testimony which leads him to that conclusion is strained at best. The record indicates that Mr. Kain, conducting direct examination of Captain Wheeler, asked the following question:

> "Will you tell me, Captain, based on your experience as a stevedore superintendent and a ship's officer, is grease a necessary produce in lashing work?" (221).

Counsel for the third party defendant objected to the question as being too broad. The Court sustained the objection (222), and before allowing Captain Wheeler to answer the question, Judge Mishler stated:

> "I would like to know whether the Captain is qualified to express an opinion as to the *customs* and *practices* in the Port of New York and more precisely on the Brooklyn piers concerning lashing, stowage of cargo." (Emphasis supplied.) (222.)

Then in response to questions by Mr. Kain as well as the Court, it was elicited that Captain Wheeler's main experience was in Manhattan; that he had had some contact with Brooklyn piers, but that, in any event, the practices regarding lashings were the same in Brooklyn as in Manhattan, and indeed were the same throughout the world. Mr. Kain again proceeded to pose the question as to whether or not grease was necessary in lashing work. The Court, clearly satisfied by its colloquy that the witness was qualified to express an opinion as to custom and practice, allowed Captain Wheeler to answer the question, and he did so, stating that:

> "The application of grease is necessary on threaded elements of the lashing components" (223).

Thus, the shipowner urges that Captain Wheeler's testimony in fact was as to custom and practice.

Point II of appellant's brief concerns itself with the alleged failure on the part of Captain Wheeler to testify as to specific instances on which C. C. Lumber had used grease in lashing prior to plaintiff's accident. On this issue, the shipowner initially draws the distinction between evidence as to custom and usage and evidence of a habit of third party defendant, either of which can be offered to show that C. C. Lumber engaged in certain conduct on the date in question. With respect to habit, specifically, the shipowner respectfully contends that a fair reading of Captain Wheeler's testimony taken as a whole leads to the conclution that C. C. Lumber used grease in lashing prior to plaintiff's accident. Captain Wheeler testified that he had on many occasions seen grease applied to deck lashings, specifying that in some years he came in contact with as

many as 66 ships per month (231). Immediately prior to that particular testimony, the witness, in response to questions by the Court, stated that he knew third party defendant, and that he had seen its lashers working on various ships on approximately 100 occasions (230-231). Therefore, the instances of observation of C. C. Lumber lashing work were among the total number of times when Captain Wheeler saw lashing being performed with the use of grease. This renders appellant's argument that, in this case, there was no evidence of even one prior instance (page 8 of the brief) wholly untenable.

It is also shipowner's contention that the use of the word "necessary" in Captain Wheeler's testimony indicates that his statement regarding the lashing process constituted more than testimony as to custom and usage. Rather, he was describing, by definition, the manner in which a maritime carpentry function is performed (223-224). As such, this testimony was properly afforded great weight, and was correctly regarded by Judge Mishler as sufficient to prove that *in fact,* on April 3, 1969, employees of C. C. Lumber used grease in lashing cargo at hatch No. 5 and that some of that grease was the ultimate cause of plaintiff's accident. *United States* v. *Oddo,* 314 F.2d 115, 117 (2d Cir.), cert. den. 375 U.S. 833 (1963); *Joseph* v. *Krull Wholesale Drug Co.,* 147 F. Supp. 250, 258 (E.D. Pa., 1956), aff'd 245 F.2d 231 (3d Cir., 1957); *Howard* v. *Capital Transit Co.,* 97 F. Supp. 578, 579 (D.D.C., 1951), aff'd 196 F.2d 593 (D.C. Cir. 1952).

It must be noted at this point that appellant has conspicuously ignored the fact that Captain Wheeler's testimony as to custom and usage was uncontradicted in this case. Indeed, appellant was better able than the shipowner

to produce evidence as to its own custom and practice or lack thereof but failed to do so. As a result, the relevance of the following three cases, relied upon by C. C. Lumber in its brief is irreparably emasculated since in each of them *both* sides offered testimony as to whether a custom and practice existed in a given situation or industry and as to the nature of any such custom and practice: *McClellan* v. *Pennsylvania R. Co.*, 62 F.2d 61 (2d Cir., 1932); *Tropea* v. *Shell Oil Company*, 307 F.2d 757 (2d Cir., 1962); *United States Shipping Board E. F. Corp.* v. *Levensaler*, 290 F. 297 (D.C. Cir., 1923), cert. den. 266 U.S. 630 (1924).

On page 7 of the brief, appellant attempts to discredit Captain Wheeler's testimony as to the necessity of using grease in lashing by reference to the following colloquy between Mr. Delaney and the Captain (232):

> "Q. I think his Honor asked can you lubricate those same fittings that you were talking about that you said you had to use grease, can you lubricate them with oil?
>
> A. You could, but it wouldn't stay on. The heavy rain or sea coming over would wash it right off.
>
> Q. The fact is, that you can lubricate with oil?
>
> A. You can. Anything is possible."

Appellant would have this Court conclude that the custom was to use grease *or oil* in lashing. The shipowner, however, relies on the Captain's statement that "anything is possible" and respectfully submits that the witness did not mean to say that oil was an acceptable substitute for grease. Supportive of shipowner's contention is the additional statement by Captain Wheeler that oil would not stay on the fittings, but would be washed off by rain or sea water (232). In this regard, appellant also makes the argument

at page 7 of its brief that at no time did Captain Wheeler say that the custom of the trade did not permit the use of oil. That statement is misleading due to the use of the double negative, for the same could be said regarding the use in lashing of *any* substance other than grease. C. C. Lumber, however, cites the case of *Federal Reserve Bank* v. *Molloy,* 264 U.S. 160 (1924) for the proposition that a party is not bound by a certain manner of doing a thing if the custom is that it be done in either of two ways. The testimony as to custom in the *Molloy* case was that a bank can cancel checks and remit by means of its exchange draft *or* by a shipment of currency. In the instant case there was no testimony that it was the custom and practice in the industry to use grease *or* oil in the lashing of cargo. In any event, appellant fails to suggest how its position would be improved if Judge Mishler had found that oil, rather than grease, had been used in the lashing work.

Plaintiff testified that he observed his co-employee operating a saw at hatch No. 5 prior to the accident. He also stated that he observed pieces of wood in the area where the sawing was being performed, and that there must have been sawdust. With this direct testimony as a basis, Captain Wheeler testified:

> "The bar of the saw, that solid blade-like apparatus around which the chain is drawn—the chain runs in a very small groove on the edge of that bar. It's imperative that that surface, that metal to metal surface between the chain and the bar be lubricated and any light motor oil, No. 10, S.A.E., similar to what you put in your automobile, is deposited in this reservoir built into the frame of the saw.

> "Each, maybe, every third piece you cut, every third piece of two by four that you cut, you press that plunger, depress the plunger. That squirts—puts a small squirt of oil onto the blade. This blade continuously runs around. That surface has to be lubricated. Otherwise, the chain, the components, the link of the chain will get overheated. The chain will fail and break" (226-227).

Then with respect to the wood being cut:

> "Dunnage is uncured or undried lumber, fresh cut from the sawmill. It's hardwood, oak etcetera. It has a high moisture content, sap from the tree. When the combination of oil from the saw, the sawdust and the sap from the fresh lumber, it makes a deposit, a coagulation that sticks to this, inside the housing, this shield plate here. If you notice the housing of the saw motor is faired, the fairing here, so that as the blade goes round, the deposits in this area, and buildup and periodically, a lump of this material; oil, sawdust and sap from the tree will be ejected from the saw" (227-228).

Captain Wheeler described this combination of substances as having a "greasy appearance" with "solid matter" (236-237). Corroborative of this, Chief Officer Nielsen testified that the substance which he observed on the deck of the vessel after plaintiff's accident was brown with some solid matter in it (110). Mr. Pampillonia, himself, described the substance upon which he slipped as being dark and *oily* (36). Therefore, the District Court, based upon the direct evidence with respect to the saw and *without having to make any inferences based thereon,* could have concluded

that plaintiff slipped on this combination of oil, sawdust and sap which could only have encumbered the deck of the S.S. Jill Cord through the instrumentality of an employee of C. C. Lumber.

POINT III

The District Court's conclusion that appellant must indemnify the shipowner was supported by proof at the trial that C. C. Lumber created the slippery condition on the deck of the S.S. Jill Cord and/or that it knew or should have known of such condition.

Regarding the issue of whether C. C. Lumber had notice of the slippery condition on board the S.S. Jill Cord, appellant argues that the Trial Court's dismissal of plaintiff's negligence claim against the shipowner can inure to its benefit (page 14 of the brief). Appellant reasons that since the Court found that the shipowner had no notice of this condition, it, too, lacked such notice. The argument is fallacious for two reasons. First, a distinction should be made between the shipowner's duty to plaintiff to refrain from engaging in negligent conduct, an aspect of tort liability, and C. C. Lumber's contractual warranty of workmanlike performance owed to the shipowner which can be breached without a finding of negligence. *Italia Societa Per Azioni Di Navigazione* v. *Oregon Stevedoring Co., Inc.*, 376 U.S. 315 (1964). Secondly, the District Court's dismissal of the negligence claim against the shipowner occurred at the conclusion of the plaintiff's case, at which point, Judge Mishler stated that "no one testified that this condition was there one moment before. There's no proof as to how long it was there" (89). The Court's ruling must

be considered in light of the evidence that had been adduced up to that point in the trial. Indeed, it was not until after that point that the Court heard testimony from Chief Officer Nielsen to the effect that the stevedore had not been at No. 5 hatch since 11:00 a.m. on the morning of the accident (96-97). Only later were photographs admitted into evidence which showed that lashing had, in fact, been done at hatch No. 5 (132) and that grease was necessary to the lashing procedure (223). Similarly, it was not until the indemnity claim was tried that the Court heard testimony that the mixture of oil, sap and sawdust is ejected from the saw which was being operated at hatch No. 5 by plaintiff's co-employee (236). Therefore, significant testimony not heard until *after* the Trial Court's ruling on plaintiff's negligence claim, permitted Judge Mishler to infer that the appellant had notice, constructive or otherwise, of the slippery condition on the deck of the vessel. Moreover, plaintiff was never required to prove the precise nature of the source of the slippery substance which caused his accident (140).

Appellant relies upon the case of *Ignatyuk* v. *Tramp Chartering Corp.*, 250 F.2d 198 (2nd Cir., 1957), where this Court stated at page 201:

> "An implied warranty of workmanlike performance by a stevedore does not place upon him a duty to discover defects in the apparatus or equipment furnished by the vessel being loaded or unloaded which was not obvious upon a cursory inspection."

The shipowner points out that the *Ignatyuk* case involved a latent defect and, therefore, the ruling of the case must

be viewed in that context, and distinguished from the conspicuous defect involved in the instant case.

In addition, appellee respectfully submits that this Court did not, in its prior decision, mean to absolve one who owes a warranty of workmanlike performance from any and all responsibility of inspections. It is the contention of the shipowner here that it was entitled to rely upon the quality of the performance of C. C. Lumber with respect to inspection of the main deck for slippery substances. *D/S Ove Skou* v. *Hebert,* 365 F.2d 341 (5 Cir., 1966), cert. den., 400 U.S. 902 (1970). In that case, the Fifth Circuit found a defect in the vessel's hatch boards, which it did not characterize at latent. The Court awarded the shipowner indemnity stating that "the stevedore having the last operational contact with them (the hatch boards) is in a position to avoid altogether, or minimize greatly, the hazard." (Parenthetical material supplied.) 365 F.2d at 348. Judge Brown in his opinion stated that the Maritime Industry has provided the stevedore (and this applies to the Marine Carpenter) with a standard of "vigilance," and that:

> "The Court was warranted in inferring that had this vigilance been exercised, the defect would have been revealed. On this approach the obligation of Port Arthur Stevedores to indemnify rests on what ought to have been done earlier by it, cf. *T. Smith & Son, Inc.* v. *Skibs A/S Hassel,* 5th Circuit, 1966, 362 F.2d 745, not on any supposed existence of sufficient time between Hebert's theoretical discovery of the deficiency and the moment of the accident." 365 F.2d at 350.

The shipowner in the instant case takes the position that it was incumbent upon C. C. Lumber, during the period of its exclusive possession and control of the main deck of the S.S. Jill Cord at hatch No. 5, to have discovered the slippery condition and to have remedied it.

When viewed in light of an industry standard of vigilance, the facts here are distinguishable from those in *Calderola* v. *Cunard Steamship Company,* 279 F.2d 475 (2d Cir.), cert. den., 364 U.S. 884 (1960) cited by appellant. In that case, this Court did not consider evidence at trial leading to an inference that the third party defendant had constructive notice of a slippery condition due to its exclusive control of a portion of the vessel during a substantial period of time as in the instant case. Rather, the *Calderola* case was one of actual notice which had been received by plaintiff, and thus imputed to his employer, only a matter of minutes before the accident. Such a distinction was made by this Court in its decision in *Drago* v. *A/S Inger,* 305 F.2d 139, 142 (2nd Cir.), cert. den. 371 U.S. 925 (1962). There, Judge Lumbard affirmed the District Court finding of indemnity aganist the third party defendant due to the breach of its contractual:

> "Duty to remedy, or have the ship's crew remedy, a dangerous condition that exists for a period sufficient for the stevedore to have constructive notice thereof." 305 F.2d at 142.

It is entirely reasonable then that C. C. Lumber should bear the ultimate responsibility for failing to remedy a condition which was so open and notorious that discovery thereof would have resulted from the exercise of due diligence. *Santomarco* v. *United States,* 277 F.2d 255, 256 (2d Cir.),

cert. den., 364 U.S. 823 (1960); *Lunsford* v. *Bethlehem Steel Corporation,* 269 F. Supp. 570 (D. Md., 1967).

The scope of the employer's duty in this regard was outlined in *De Gioia* v. *U. S. Lines,* 304 F.2d 421 (2d Cir., 1962) as follows at 424:

> "Whether a hazard is created by the negligence of the shipowner or otherwise, the stevedoring firm is liable for indemnity if a workmanlike performance would have eliminated the risks of injury."

Because of its exclusive control over the work area, appellant " . . . was in a far better position than the shipowner to avoid the accident." *Italia Societa per Azioni* v. *Oregon Stevedoring Co. Inc.,* 376 U.S. 315, 323 (1964). Appellant's breach of warranty in allowing a slippery substance to remain in the work area (263) was, clearly, the fault "immediately antecedent to the injury" within the meaning of that phrase recently used by this Court in *Hurdich* v. *Eastmount Shipping Corp.,* 503 F.2d 397 (2d Cir., 1974).

Appellant's argument that the verdict on the indemnity claim is inconsistent with the jury findings regarding the interchangeability of the words "oil" and "grease" on the main claim is simply one of semantics. It should be noted initially that the opinion of the District Court granting indemnity is couched in terms of "placing or dropping grease," "allowing the grease or other slippery substance to remain," and "failing to eliminate a 'slippery condition' " (263). As such, there is absolutely no necessity for it to be read as conflicting with the jury verdict rendered after the court's charge containing the term "grease." *Caputo* v. *U. S. Lines Company,* 211 F.2d 413 (2d Cir.), cert. den., 374 U.S. 833 (1963), cited by appellant at page 13 of the

brief, is not pertinent since it involved a finding by the Court, on the indemnity claim, of a *latent* cargo defect which was clearly in conflict with the jury finding of improper stowage. This inconsistency was "crucial," since the shipowner could obtain indemnity if the jury's theory were adopted, but could not do so in a latent defect situation. 311 F.2d at 415. No such crucial difference exists in the instant case. Finally, if this Court is to accept appellant's argument that in rendering the verdict for the plaintiff the jury is presumed to have followed the Court's instructions, citing *Joel* v. *Research Products*, 94 F.2d 588, 589 (2nd Cir., 1938), it should be noted that the plaintiff himself testified that the substance upon which he slipped was "dark, *oily*" (36).

Judge Mishler specifically found that C. C. Lumber had breached its warranty of workmanlike performance by failing to eliminate the slippery condition on the deck of the S.S. Jill Cord as required by the Safety and Health Regulations for Longshoring. It is well settled in this Circuit that these regulations are binding only upon employers such as C. C. Lumber. *Albanese* v. *N.V. Nederl. Amerik. Stoomv. Maats.*, 346 F.2d 481 (2d Cir., 1965), *rev'd on other grounds*, 382 U.S. 283 (1966) Furthermore, that the *Albanese* rule is still viable in the Second Circuit was clearly suggested by Judge Gurfein in the recent case of *Bernardini* v. *Rederi A/B Saturnus*, decided March 11, 1975, Docket No. 74-1404 (2d Cir. 1975) at footnote 6 of the Court's opinion.

These decisions are firmly supported by the actual language of the Safety and Health Regulations contained in 29 C.F.R. §1504.2 (now 29 C.F.R. §1918.2) which states in pertinent part:

"(a) The responsibility for compliance with the regulations of this part is placed upon 'employers' as defined in Section 1918.3(c).

"(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom."

Regulation §1504.3(a) (now §1918.3(a)) states:

"The term 'shall' indicates provisions which are mandatory."

Regulation §1504.3(c) (now §1918.3(c)) provides:

"The term 'employer' means an employer any of whose employees are employed, in whole or in part, in longshoring operations or related employments, as defined herein within the Federal maritime jurisdiction on the navigable waters of the United States."

It is the contention of the shipowner in the instant case that the conduct of C. C. Lumber constituted a patent violation of the applicable regulation here that:

"Slippery conditions shall be eliminated as they occur." 29 C.F.R. §1504.91(c) (now 29 C.F.R. §1918.91 (c)).

A shipowner would clearly be entitled to indemnity from an independent contractor which violated the Safety

and Health Regulations in *failing to eliminate* a slippery condition which had been caused by another. Even stronger, however, is the case for indemnity where, as here, the record supports a finding that C. C. Lumber *itself created the slippery condition* during the period it was in exclusive control of the deck of the S.S. Jill Cord at hatch No. 5 and was using grease in the lashing of cargo and a power saw which ejected a substance that gives a "greasy appearance." Indeed, Judge Mishler specifically found that appellant breached its warranty by "*placing* or *dropping* grease in areas normally used for passage by longshoremen" (263).

As the Court stated in *Dowding* v. *Compagnie Fabre Societe Generale,* 1971 A.M.C. 1498, 1500 (N.D. Ill., 1971):

> "Where a stevedore has violated one of the regulations prescribing the minimum standards to be maintained by a stevedore to guard the safety of its men, and an accident which the regulation was designed or intended to prevent occurs, the violation constitutes negligence *per se* on the part of the stevedore in an action by the shipowner for indemnity." Citing *Grigsby* v. *Coastal Marine Service,* 412 F.2d 1011 (5th Cir., 1969).

CONCLUSION

The judgment of the District Court should in all respects be affirmed.

Respectfully submitted,

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